

FILED

JUL 11 2008

RICHARD W. WIEKING
CLERK, U.S. DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

FREDERICK LEE BAKER,

Plaintiff,

v.

JAMES DAVIS, Chairman,
BOARD OF PAROLE HEARINGS; SUSAN
FISHER, ARCHIE BIGGERS, SANDRA
BRYSON, ROBERT DOYLE, JANICE ENG,
JACK GARNER, EDWARD MARTINEZ,
MICHAEL PRIZMICH, LINDA SHELTON,
ROLANDO MEJIA, DANIEL MOELLER,
and ARTHUR ANDERSON, Commissioners;
SANDRA MACIEL, Staff Services
Manager I, BPH Decision Processing
and Scheduling Unit, et. al.,

Defendants.

Case No: CV 07-6289 CW (PR)

PLAINTIFF'S BRIEF IN SUPPORT
OF PRELIMINARY INJUNCTION

Frederick L. Baker
Correctional Training Facility
C-22918 / B-321
P.O. Box 689
Soledad, CA 93960-0689

Petitioner in Pro Se

ORIGINAL

TABLE OF CONTENTS

TABLE OF AUTHORITIES	111
PETITION FOR PRELIMINARY INJUNCTION	1
STATEMENT OF THE CASE	2
STATEMENT OF FACTS	3
JURISDICTION	4
MEMORANDUM OF POINTS AND AUTHORITIES	
PLAINTIFF IS ENTITLED TO A PRELIMINARY INJUNCTION DIRECTING DEFENDANTS TO DISCONTINUE THEIR PRACTICE OF DESTROYING THE BPT-1000(a)-(b) WORKSHEETS PRIOR TO A COMPLETE TRANSCRIPT OF ALL DOCUMENTS RELIED UPON BY THE BOARD PANEL HAVE BEEN TRANSCRIBED PURSUANT TO PENAL CODE SECTION 3042(b)-(d)	5
A. Illegal Destruction of Records	6
B. Irreparable Injury	7
C. Absent of Harm to the Adverse Party	8
D. Public Interest	8
E. Likelihood of Ultimate Success on the Merits	9

TABLE OF AUTHORITIES

FEDERAL CASES

<u>Bakalis v. Golembeski</u> , 35 F.3d 318 (7th Cir. 1994)	8, 9
<u>City of Anaheim, Cal. v. KLEPPE</u> , 590 F.2d 285 (9th Cir. 1979)	6
<u>Elrod v. Burns</u> , 427 U.S. 347 (1976)	7
<u>Greenholtz v. Nebraska Penal Inmates</u> , 442 U.S. 1, 99 S.Ct. 2100, 60 L.Ed.2d 668 (1979)	8
<u>Golden State Bottling Comp. NY, Inc. et al., v. National Lab. Relations Board</u> , 414 U.S. 168 (1973)	4, 5
<u>Hayward v. Marshall</u> , 512 F.3d 536 (9th Cir. 2008)	6
<u>Memphis Light, Gas & Water Division v. Craft</u> , 436 U.S. 1, 98 S.Ct. 1554, 56 L.Ed.2d 30 (1978)	5, 6
<u>Regal Knitwear Co. v. NLRB</u> , 342 U.S. 9 (1945)	5
<u>Sass v. Bd. of Prison Terms</u> , 461 F.3d 1123 (9th Cir. 2006) ...	9
<u>Sierra Club v. Hathaway</u> , 579 F.2d 1162 (9th Cir. 1978)	6
<u>Superintendent v. Hill</u> 472 U.S. 445, 105 S.Ct. 2768, 86 L.Ed.2d 356 (1985)	9
<u>Withrow v. Larkin</u> , 421 U.S. 35, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975)	9
<u>Wolff v. McDonnell</u> , 418 U.S. 539, 94 S.Ct. 2963, 41 L.Ed.2d 935 (1974)	7

STATE CASES

<u>In re Duvall</u> , 9 Cal.4th 464 (1995)	9
<u>In re Minnis</u> , 7 Cal.3d 639 (1972)	8
<u>In re Sturm</u> , 11 Cal.3d 258 (1974)	7, 8

FEDERAL STATUTES

U.S. Const., Amend, V	8
U.S. Const., Amend, XIV	8

28 U.S.C. § 1367	4
42 U.S.C. § 1331(a)	4
42 U.S.C. § 1343	4
Fed. Rules of Civ. Pro.	1, 5, 10

STATE STATUTES

Civil Code § 1798.32	2
Gov. Code § 14750	2
Gov. Code § 14755	6
Penal Code § 3041(b)	5, 6
Penal Code § 3042(b)	5, 6, 9
Code of Regs. § 2254	7

Frederick L. Baker
 Correctional Training Facility
 C-22918 / B-321
 P.O. Box 689
 Soledad, CA 93960-0689

Petitioner in Pro Se

IN THE UNITED STATES DISTRICT COURT
 FOR THE NORTHERN DISTRICT OF CALIFORNIA

FREDERICK LEE BAKER,

Plaintiff,

v.

JAMES DAVIS, Chairman,
 BOARD OF PAROLE HEARINGS; SUSAN
 FISHER, ARCHIE BIGGERS, SANDRA
 BRYSON, ROBERT DOYLE, JANICE ENG,
 JACK GARNER, EDWARD MARTINEZ,
 MICHAEL PRIZMICH, LINDA SHELTON,
 ROLANDO MEJIA, DANIEL MOELLER,
 and ARTHUR ANDERSON, Commissioners;
 SANDRA MACIEL, Staff Services
 Manager I, BPH Decision Processing
 and Scheduling Unit, et. al.,

Defendants.

Case No: CV 07-6289 CW (PR)

BRIEF IN SUPPORT OF
 PLAINTIFF'S MOTION FOR
 PRELIMINARY INJUNCTION;
 MEMORANDUM OF POINTS AND
 AUTHORITIES

COMES NOW, PLAINTIFF FREDERICK LEE BAKER, hereby moves the
 above entitled Court pursuant to Rule 65(d) of the Federal Rules
 of Civil Procedure, in order to prevent irreparable injury a
 Preliminary Injunction is necessary. There is a substantial
 likelihood the plaintiff will prevail on the merits for permanent
 relief. The injury plaintiff may once again endure if the
 Preliminary Injunction Order is not granted outweighs any
 possible injury to the defendants if the Preliminary Injunction
 Order is granted. The issuance of a Preliminary Injunction Order

1 will not harm the public interest, but will in fact preserve the
2 public's interest. As set forth in the memorandum of points and
3 authorities, and the affidavit of the plaintiff good cause
4 exist for the Order.

5 STATEMENT OF THE CASE

6 On September 24, 2004, plaintiff appeared before a Board of
7 Parole Hearings ("Board") for a seventh time and was found
8 suitable for parole. See Ex. 1 (BPT-Form 1005, Life Prisoner,
9 Proposed Decision). However, after reading its findings and
10 supporting reasons from the BPT-1000(b) form into the record
11 during the parole hearing, the Board Panel "presumably
12 destroyed" the document "in the normal course of business."
13 Ex. 2 (Declaration of Sandra Maciel) p. 2; see also Plaintiff's
14 Declaration in Support of Preliminary Injunction. Consequently,
15 plaintiff's parole date was disapproved and rescinded because
16 the Board destroyed the forementioned BPT-1000(b) worksheet and
17 also failed to retain the tape that the information was read
18 into. Ex's 3 (Decision Review Unit's Disapproval Recommend-
19 ation) and 4 (En Banc Board's Disapproval/Rescission). The
20 Board is not entitled to continue its practice of destroying
21 or otherwise disposing the record during parole consideration
22 hearings because the law requires that "the tape(s)" and "forms
23 filled out by the Board panel at the hearing" be forwarded to
24 the Decision Processing and Scheduling Unit for appropriate
25 management of the records. See Ex. 2.; Civil Code § 1798.32;
26 Gov. Code § 14750.

1 On June 13, 2008, Correctional Counselor M. Terry, notified
2 plaintiff that he will be attending his ninth subsequent parole
3 consideration "BPH hearing scheduled" for October 17, 2008.

4 Ex. 5. This motion seeks a preliminary injunction to preserve
5 the written summary of the record generated at that parole
6 hearing containing the panel's "findings and supporting reasons"
7 for their decision, and to compel the defendants to discontinue
8 their practice of illegally destroying official records. Thus,
9 protecting plaintiff's right to have a complete record available
10 for judicial review, his parole application duly consider, the
11 Governor's right to review the decision, and the public's
12 interest in having a complete transcript available for its
13 review.

14 STATEMENT OF FACTS

15 As set forth in detail in the affidavit of Frederick Lee
16 Baker attached, defendants Susan Fisher and Rolando Mejia¹/,
17 generated a "written summary" containing the evidence relied
18 upon, and their findings with supporting reasons during the
19 September 2004 hearing and incorporated the pertinent
20 information from that document into the record. Access to the
21 critical information retained in the document (BPT-Form 1000(a)-
22 (b)) is limited to defendants and directly impacts plaintiff's
23 liberty interest. If the plaintiff once again receives a
24 favorable decision and the defendants were to lose or destroy
25

26 1. Mr. Rolando Mejia presided over the proceeding as the
27 Deputy Commissioner.

1 the written summary before the record was completely
2 transcribed, plaintiff will be subjected to months and years of
3 continued deprivation of liberty.

4 JURISDICTION

5 This Honorable Court presently retains jurisdiction of this
6 action and all parties pursuant to 42 U.S.C. §§ 1331(a), 1343,
7 and 28 U.S.C. § 1367. Defendants James Davis, Susan Fisher,
8 Archie Biggers, Sandra Bryson, Robert Doyle, Janice Eng, Jack
9 Garner, Edward Martinez, Michael Prizmich, Linda Shelton, Arthur
10 Anderson, Sandra Maciel, Rolando Mejia and Daniel Moeller are
11 properly served parties to this action. Defendant Susan Fisher
12 is no longer employed at the Board of Parole Hearings. The
13 United States Supreme Court has made it clear "that a bona fide
14 [person],... may be considered in privity with [his/her]
15 predecessor for purposes of Rule 65(d)." See Golden State
16 Bottling Company NY, Inc. et al., v. National Labor Relations
17 Board, 414 U.S. 168, 1280 (1973). Defendant Ronaldo Mejia and
18 others "in privity" with defendant Fisher "acquired" the
19 knowledge that the wrong remains unremedied through several
20 Monterey Superior Court Orders lodged with this Court and the
21 litigation now pending before this Court. See Ex's H, J and
22 N (CV 07-6289 CW (PR)). Therefore, the defendants can be
23 legally considered in privity with defendant Fisher for Rule
24 65(d) purposes, which gives this Honorable Court jurisdiction
25 over the defendants.^{2/}

26
27 2. Ms. Debra Levorse, Classification and Parole Represent-
28 ative, Records Department, CTF, functions as the liaison between
the defendants and CTF. (Ex. 7.)

1 In the alternative, defendants are presently employed with
 2 the Board of Parole Hearings. The present relationship between
 3 defendants and the Board, legally places them in "[a]ctive
 4 concert or participation with each other" and thus, invokes the
 5 "privity rule" articulated in Regal Knitwear Co. v. NLRB,
 6 342 U.S. 9 (1945) and Goldenstate Bottling Co., supra, and
 7 further codified at Rule 65(d) of the Federal Rules of Civil
 8 Procedure, wherein it is averred a preliminary injunction "is
 9 binding only upon the parties to the action, ...and upon those
 10 persons in active concert or participation with them who receive
 11 actual notice of the order by personal service or otherwise."

12 MEMORANDUM OF POINTS AND AUTHORITIES

13
 14 **PLAINTIFF IS ENTITLED TO A PRELIMINARY INJUNCTION DIRECTING**
 15 **DEFENDANTS TO DISCONTINUE THEIR PRACTICE OF DESTROYING THE**
 16 **BPT-1000(a)-(b) WORKSHEETS PRIOR TO A COMPLETE TRANSCRIPT OF ALL**
 17 **DOCUMENTS RELIED UPON BY THE BOARD PANEL HAVE BEEN TRANSCRIBED**
 18 **PURSUANT TO PENAL CODE SECTION 3042(b)-(d)**

19 In Memphis Light, Gas & Water Division v. Craft, 436 U.S.
 20 (1978), the Supreme Court ruled that:

21 "[t]he Fourteenth Amendment places procedural constraints
 22 on the actions of government that work a deprivation of
 23 interest enjoying the stature of '[liberty]' within the
 24 meaning of the Due Process Clause."

25 Id. at p. 8. The Court further explained that even if "the
 26 underlying substantive interest is created by 'an independent
 27 source such as state law,' federal constitutional law determines
 28 whether that interest rises to the level of a 'legitimate
 claim of entitlement' protected by the Due Process Clause."
Craft, supra, 436 U.S. at p. 8.

1 Here, because plaintiff has a liberty interest in parole
2 that "arises as a result of California Penal Code section
3 3041(b)" (Hayward v. Marshall, 512 F.3d 536, 542 (9th Cir.
4 2008)), and the defendants have the burden of establishing the
5 record pursuant to subdivision (b) of Penal Code section 3042,
6 a preliminary injunction may be granted by this federal Court
7 upon a showing that 1) the "conduct sought to be enjoined is
8 illegal" (Memphis Light, Gas & Water Division v. Craft, supra,
9 436 U.S. at 8); 2) the plaintiff is in danger of irreparable
10 injury; 3) the adverse party will not be substantially harm if
11 a preliminary injunction is granted; 4) the preliminary
12 injunction is consistent with the public interest; and 5) the
13 plaintiff has a strong likelihood of success in winning
14 permanent injunction. See City of Anaheim, Cal. v. KLEPPE,
15 590 F.2d 285, 288 n. 4 (9th Cir. 1979); Sierra Club v. Hathaway,
16 579 F.2d 1162, 1167 (9th Cir. 1978). Plaintiff is entitled to
17 a preliminary injunction under these standards:

18 A. Illegal Destruction of Records

19 California law states that "[n]o record shall be destroyed
20 or otherwise disposed of by any agency of the state, unless it
21 is determined by the director that the record has no further
22 administrative, legal, or fiscal value." See Gov. Code § 14755.
23 As subject matter, subdivision (b) of Penal Code 3042, provides
24 that:

25 "[t]he Board of [Parole Hearings] shall record all those
26 hearings and transcribe those hearings within 30 days of
27 any hearing", and that t]hose transcripts...shall be made
28 available to the public no later than 30 days from the date
of the hearings."

1 Id. The specific criteria for creating the record is promul-
2 gated in section 2254 of the California Code of Regulations,
3 which includes "a verbatim transcript, tape recording or written
4 summary." Notwithstanding, that the courts have long recognized
5 that both state and federal due process requirements dictate
6 that the Board must apply detailed standards when creating a
7 parole hearing record (Wolff v. McDonnell, 418 U.S. 539, 563-565
8 (1974); Sturm, supra, 11 Cal.3d at 270), the defendants admitted
9 practice of using the regulatory provisions as a guide to
10 "announc[e] their decision" (Ex. 6), rather than to establish
11 the record and then destroy the written summary, violates the
12 principled basis for promulgating the standard of producing the
13 record. In fact, every time the defendants destroy the record
14 without ensuring the preservation of the critical information
15 necessary for review, violates the law and plaintiff's right
16 to due process.

17 B. Irreparable Injury

18 The loss of constitutional rights, even for short periods
19 of time, constitutes irreparable injury. Elrod v. Burns, 427
20 U.S. 347, 373 (1976). In this case, the defendants have a
21 mandatory obligation to secure information which is relevant,
22 and in fact essential, to the plaintiff's protected liberty
23 interest in release on parole and thus, defendants must observe
24 the procedural safeguards built into the statutes and
25 regulations, and avail themselves of the alternative remedies.
26 See Civil Code § 14755 (holding that each agency shall
27 "establish safeguards to ...ensure the security" of records);
28

1 In re Minnis, 7 Cal.3d 639, 649-650 (1972); Greenholtz v.
2 Nebraska Penal Inmates, 442 U.S. 1, 2, 15 (1979). The
3 destruction or disposal of the BPT-1000(a)-(b) Worksheet clearly
4 violates the constitution. (U.S. Const., 5th & 14th Amend.)
5 Moreover, the defendants "must exercise [their] discretion in
6 good faith, neither arbitrarily nor capriciously." In re Sturm,
7 11 Cal.3d 258, 268 (1974).

8 C. Absent of Harm to the Adverse Party

9 The defendants have no legitimate interest in destroying
10 the BPT-1000(a)-(b) Worksheets. First, there is no additional
11 cost to maintain the forms in the custodial facilities, because
12 the California Department of Corrections and Rehabilitation
13 already generates the forms specifically for Board use. See Ex.
14 9 (Listing of required BPT Forms); Ex. 10 (Blank BPT-1000(a)
15 Form); Ex. 11 (Blank BPT-1000(b) Form). Second, it provide
16 an alternative remedy to secure the evidence relied upon by the
17 Board panel and their findings with supporting reasons "without
18 incurring the unnecessary burden of a second fact-finding
19 process." Minnis supra, 7 Cal.3d at 650 (1972). And third, it
20 protects the public's interest. Thus, there will be not be harm
21 to the defendants from a preliminary injunction.

22 D. Public Interest

23 Since "there is a presumption that those making decisions
24 affecting the public are doing so in the public interest"
25 (Bakalis v. Golembeski, 35 F.3d 318, 326 (7th Cir. 1994), and
26 "[s]ociety's interest in the finality of [judiciary] proceedings
27
28

1 so demands "truth, accuracy, and fairness" (In re Duvall, 9
2 Cal.4th 464, 474 (1995)), the public's interest is best served
3 when all "tape(s) of the hearings and forms filled out by the
4 Board panel at the hearings" (Ex. 2) are forwarded to the
5 Decision Processing and Scheduling Unit and transcriber to be
6 saved electronically and officially transcribed. Thus, ensuring
7 that complete hearing transcripts will be "made available to
8 the public" (Pen. Code § 3042(b)) and preserving the "honesty
9 and integrity in those serving as adjudicators." See Bakalis,
10 supra, 35 F.3d at p. 324; Withrow v. Larkin, 421 U.S. 35, 47
11 (1975) (a fair trial in a fair tribunal is a basic requirement
12 of due process, and this rule applies to administrative agencies
13 which adjudicate as well as to courts).

14 E. Likelihood of Ultimate Success on the Merits

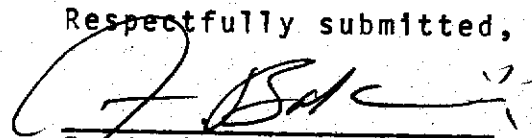
15 Plaintiff's likelihood of winning a final judgment on the
16 issue of the defendant's inappropriate destruction of critical
17 information is overwhelming. The public's interest in finality
18 of parole consideration proceedings and plaintiff's right to be
19 protected by the due process clause of the United States
20 Constitution, and to be free from an arbitrary determination
21 is so well established as to be unquestionable. Superintendent
22 v. Hill, 472 U.S. 445, 457 (1985); Sass v. Bd. of Prison Terms,
23 461 F.3d 1123, 1128-1129 (9th Cir. 2006); see also Withrow,
24 supra, 421 U.S. at p. 47 (holding that "'our systems of law has
25 always endeavored to prevent even the probability of
26 unfairness'").

1 Rule 65, FRCP, requires an applicant for a preliminary
2 injunction to certify to the Court the efforts that have been
3 made to given notice to the adverse party and/or the reasons why
4 notice or further efforts to give should not be required.
5 Plaintiff's efforts are described in paragraph 5 of his
6 declaration attached. The preliminary injunction should be
7 granted without delay further delay for notice purpose because
8 of the scheduled October 17, 2008 parole consideration hearing
9 and the irreparable injury plaintiff could once again suffer and
10 because of the destruction of the related BPT-1000(a) or (b)
11 Worksheet created during the hearing.

12 WHEREFORE, this Court should grant a preliminary
13 injunction, directing defendants to retain the BPT-1000(a)-(b)
14 worksheet concomitant with the tape recording.

15 Dated: 6/29/08

Respectfully submitted,


Frederick Lee Baker
Petitioner in Pro Se

18 ///

19 ///

20 ///

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

FREDERICK LEE BAKER,

Plaintiff,

v.

JAMES DAVIS, Chairman,
BOARD OF PAROLE HEARINGS; SUSAN
FISHER, ARCHIE BIGGERS, SANDRA
BRYSON, ROBERT DOYLE, JANICE ENG,
JACK GARNER, EDWARD MARTINEZ,
MICHAEL PRIZMICH, LINDA SHELTON,
ROLANDO MEJIA, DANIEL MOELLER,
and ARTHUR ANDERSON, Commissioners;
SANDRA MACIEL, Staff Services
Manager I, BPH Decision Processing
and Scheduling Unit, et. al.,

Defendants.

Case No: CV 07-6289 CW (PR)

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that I am a resident of the State of California, County of Monterey. I am over the age 18 years and a party to the within action. My business/residence address is P.O. Box 689, Soledad, California, 93960-0689.

On 6/29, 2008, I caused to be served the attached NOTICE OF MOTION FOR PRELIMINARY INJUNCTION; PLAINTIFF'S BRIEF IN SUPPORT OF PRELIMINARY INJUNCTION; AND DECLARATION IN SUPPORT OF MOTION PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION by placing a true copy thereof enclosed in a sealed envelope with postage therefore fully prepaid in the internal mail collection system at the Correctional Training Facility at P.O. Box 689, Soledad, CA 93960-0689, addressed as follows:

JAMES DAVIS
Chairman
BOARD OF PAROLE HEARINGS
P.O. Box 4036
Sacramento, CA 95814

SUSAN FISHER
Commissioner
BOARD OF PAROLE HEARINGS
P.O. Box 4036
Sacramento, CA 95814

1 ARCHIE BIGGERS
2 Commissioner
3 BOARD OF PAROLE HEARINGS
4 P.O. Box 4036
5 Sacramento, CA 95814

6 ROBERT DOYLE
7 Commissioner
8 BOARD OF PAROLE HEARINGS
9 P.O. Box 4036
10 Sacramento, CA 95814

11 JACK GARNER
12 Commissioner
13 BOARD OF PAROLE HEARINGS
14 P.O. Box 4036
15 Sacramento, CA 95814

16 MICHAEL PRIZMICH
17 Commissioner
18 BOARD OF PAROLE HEARINGS
19 P.O. Box 4036
20 Sacramento, CA 95814

21 ROLANDO MEJIA
22 Commissioner
23 BOARD OF PAROLE HEARINGS
24 P.O. Box 4036
25 Sacramento, CA 95814

26 ARTHUR ANDERSON
27 Commissioner
28 BOARD OF PAROLE HEARINGS
P.O. Box 4036
Sacramento, CA 95814

DEBRA LEVORSE
Classification and Parole
Representative, Records Dept.
P.O. Box 689
Soledad, CA 93960-0689

I declare under penalty of perjury under the laws of the
State of California the foregoing is true and correct and that
this declaration was executed on 6/29, 2008, at Soledad,
California.

Frederick Lee Baker
Declarant

SANDRA BRYSON
Commissioner
BAORD OF PAROLE HEARINGS
P.O. Box 4036
Sacramento, CA 95814

JANICE ENG
Commissioner
BAORD OF PAROLE HEARINGS
P.O. Box 4036
Sacramento, CA 95814

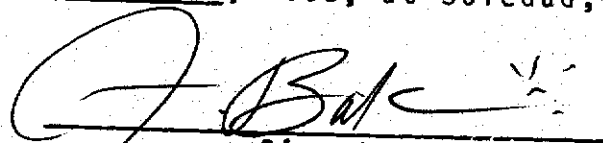
EDWARD MARTINEZ
Commissioner
BAORD OF PAROLE HEARINGS
P.O. Box 4036
Sacramento, CA 95814

LINDA SHELTON
Commissioner
BAORD OF PAROLE HEARINGS
P.O. Box 4036
Sacramento, CA 95814

DANIEL MOELLER
Commissioner
BAORD OF PAROLE HEARINGS
P.O. Box 4036
Sacramento, CA 95814

SANDRA MACIEL
Staff Service Manager I, Decision
Processing and Scheduling Unit
BAORD OF PAROLE HEARINGS
P.O. Box 4036
Sacramento, CA 95814

Attorney General of the
State of California
55 Golden Gate Ave., Suite 11000
San Francisco, CA 94102-7004


Signature